

NO. 19020-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

LEE COOK,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Terry D. Sebring, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting irrelevant and prejudicial testimony regarding gangs and Appellant's alleged gang affiliation.

2. The trial court erred in allowing impeachment of Appellant with two prior convictions for possession of a controlled substance which had no bearing on his veracity.

3. The trial court erred in refusing to admit evidence of relevant statements falling within the hearsay exception for excited utterances.

4. The trial court erred in refusing to admit relevant evidence that Appellant voluntarily turned himself in to the police.

5. The trial court erred in denying the defense motion for a mistrial after the court made erroneous evidentiary rulings which made presentation of the defense case impossible.

6. The trial court erred in refusing to allow testimony as to James Cook's cocaine use in the year and specifically on the day preceding the events to which he was allowed to testify.

7. The trial court erred in refusing to allow expert testimony about whether the events preceding the shooting appeared to involve a setup for a robbery.

8. The trial court erred in refusing to allow expert testimony about reaction times when an individual perceives a threat to his person.

9. The trial court erred in refusing to allow expert testimony regarding the state's theory as to the position of the shooter.

10. The trial court erred in denying admission of expert testimony as to the impact drug and alcohol use would have had on the decedent's behavior.

11. The trial court erred in denying admission of expert testimony as to the impact long term cocaine use had on James Cook's ability to perceive and recall the events about which he testified.

12. The trial court erred in denying Appellant his constitutional rights to present a defense.

13. The trial court erred in dismissing a juror who during the course of the trial revealed that she was not inclined to find Appellant guilty because if the decedent had received proper medical care, he would not have died, but who also assured the court under subsequent questioning that she would follow the jury instructions even if she disagreed with them.

14. The trial court erred in denying the defense motion for a mistrial after improperly dismissing a juror during the course of the trial.

15. The trial court erred in refusing to give a defense instruction on whether there is a duty to retreat.

16. The trial court erred in giving a jury instruction that the right to self-defense does not include acts done in retaliation or revenge.

17. Cumulative error denied Appellant a fair trial.

#### Issues Pertaining To Assignments of Error



1. Did admission of irrelevant and prejudicial evidence as to gangs, gang violence and Lee Cook's affiliation with a gang violate the constitutional right to freedom of association, the evidence rules, and constitutional guarantees of due process of law? Assignment of Error 1.

2. Were prior drug convictions which had no bearing on Lee Cook's veracity improperly admitted for impeachment purposes under ER 609? Assignment of Error 2.

3. Lee Cook made statements regarding the shooting within 50 minutes of the event while he was still apparently upset and in shock. Did the trial court erroneously conclude that the passage of 50 minutes meant that the statements could not fall within the hearsay exception for excited utterances? Assignment of Error 3.

4. Did the trial court improperly find that evidence that Lee Cook voluntarily turned himself in to the police was not relevant to demonstrate Lee's belief that he had acted in self-defense and thus should cooperate with the police? Assignment of Error 4.

5. Did the trial court err in denying a defense motion for a mistrial based upon the fact that the court's erroneous evidentiary rulings had made it impossible for the defense to present a case? Assignment of Error 5.

6. Did the trial court improperly find that evidence of the key state's eyewitness' cocaine abuse and use during the year and even the day preceding the shooting was not relevant even though that drug abuse affected the witness' ability to perceive and accurately report events? Assignment of Error 6.

7. Did the trial court improperly exclude expert testimony regarding whether the events preceding the shooting appeared to be a robbery setup on the grounds that the testimony did not concern an area of expertise where in fact the testimony concerned an area outside common experience and such testimony would have assisted the jury in assessing the validity of Lee Cook's claim of self-defense? Assignment of Error 7.

8. Did the trial court improperly conclude that expert testimony regarding reaction times when an individual perceives a threat to his personal safety was not relevant to appellant's claim of self-defense where the shooting did not occur during the initial death threats but only upon escalation of those threats? Assignment of Error 8.

9. Did the trial court improperly conclude that analysis of physical evidence, including the locations of bullets and casings at the scene of a shooting, was not an area of expertise? Assignment of Error 9.

10. Did the trial court improperly conclude that expert testimony regarding the impact drug and alcohol use had on the decedent's behavior was not relevant in assessing Lee Cook's claim of self-defense, even though the decedent's behavior determined whether Lee was justified in defending himself? Assignment of Error 10.

11. Did the trial court improperly conclude that the effect of drug use on perception and recollection is not an area of expertise? Assignment of Error 11.

12. Did the trial court improperly conclude that Dr. Moore, who had extensive education and professional experience and had testified repeatedly as an expert in the area of the effect of drug use on perception and recollection, was not qualified as an expert? Assignment of Error 11.

13. Did the trial court improperly exclude expert testimony on the effect of drug use on perception and recollection because the judge did not personally believe the results of the tests upon which the expert relied? Assignment of Error 11.

14. Did exclusion of reliable defense evidence deny Lee Cook his constitutional due process right to present a defense? Assignments of Error 3-12.

15. Did the trial court err in dismissing, over defense objection, a juror who had prematurely expressed her opinion of the evidence but who assured the court that she would properly follow the court's instructions? Assignment of Error 13.

16. Did the trial court err in denying a defense motion for a mistrial based upon the improper dismissal of a juror during trial? Assignment of Error 14.

17. Did the trial court err in refusing to give a "no duty to retreat" instruction given that the instruction was necessary for the defense to fully argue the theory of self-defense? Assignment of Error 15.

18. Did the trial court improperly give an instruction stating that the right of self-defense does not permit action done in retaliation or revenge when the other

instructions already fully informed the jury of the law and this instruction served only to place emphasis on the state's theory of the case? Assignment of Error 16.

19. By giving the unnecessary instruction that self-defense does not include acts done in retaliation or revenge, which served only to place emphasis on the state's theory of the case, did the court violate the constitutional prohibition against commenting on the evidence? Assignment of Error 16.

20. Did cumulative error deny Lee Cook a fair trial? Assignment of Error 17.

B. STATEMENT OF THE CASE

1. Statement of Facts

a. State's Case

Martin Price, a Tacoma police officer, testified he was called to 1617 South Sheridan at 7:27 p.m. on April 29, 1994. The call indicated that shots had been fired. 6RP 426-28.

When Price entered the house, he saw shell casings on the ground and smelled gun powder. He also saw bullet holes in the wall and the door. Inside, he saw Troy Robinson face down on the floor. Another man was standing by Robinson. Robinson appeared to have been moved a short distance. 6RP 429-30,

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The Verbatim Report of Proceedings will be designated as follows throughout this brief: 1RP refers to October 11, 1994; 2RP refers to October 18, 1994; 3RP refers to November 1, 1994; 4RP refers to November 9, 1994; 5RP refers to November 10, 1994; 6RP refers to November 14, 1994; 7RP refers to November 15, 1994; 8RP refers to November 16, 1994; 9RP refers to November 17, 1994; 10RP refers to November 18, 1994; 11RP refers to November 21, 1994; 12RP refers to November 22, 1994; and 13RP refers to December 13, 1994.

435. Price checked for vital signs and found none. Paramedics were summoned. When they arrived they were unable to revive Robinson and took him to the hospital. 6RP 436.

Price found bullet fragments and slugs sitting atop the living room floor. He did not, however, find any weapons. Price testified that 12 people were in the house after the shooting and before the scene was photographed. 6RP 437-38, 455, 464.

Toni Wentland, a Tacoma police identification technician, testified nine shell casings were found in the hallway. Wentland said none of the bullets were embedded in the carpet. She also testified that four bullets were found in wall and five in the door jamb. 6RP 472; 7RP 508, 511-12.

Technician Mary Lally testified that a 40-ounce bottle of Old English 800 Malt Liquor was on the dining room table and an empty vodka bottle was also in the house. 7RP 544, 548.

Robert Harris testified he lived at the house on Sheridan and was home during the shooting. He was there with Larue Crane, Arthur Drayton, Darnell Armstrong, Troy Robinson and Lee and James Cook. The Cooks had come by earlier looking for Armstrong. They had waited for him and then left. Later, after Armstrong returned, the Cooks came back. When Armstrong returned, he had Troy Robinson with him. 7RP 552-54.

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To assist the Court in understanding the evidence presented at trial, Plaintiff's Exhibit 1, a diagram of the house, has been designated. Additionally, a copy of a photograph of the Exhibit is attached as appendix A to this brief.

Armstrong and the Cooks had a discussion in the kitchen. Robinson was sitting at the dining room table. When Lee came in, he tried to shake Robinson's hand, but Robinson refused. Later, Robinson left the dining room table and went into the kitchen with Armstrong and the Cooks. 7RP 555-57. In the kitchen, there was a dispute. Harris saw Robinson escorting the Cooks out the door. Harris then heard gunshots. 7RP 558-59. Upon hearing the shots, Harris came into the living room and saw Robinson lying on the ground and a .45 caliber revolver near Robinson's hand. 7RP 560-61, 572.

Harris denied having told the defense investigator that all three people present in the apartment before the Cooks arrived had been smoking marijuana. He did admit they had all been drinking. Harris also stated he had told police detectives that Armstrong and Robinson had arrived together that day and that it was unusual for them to be together. 7RP 569, 573-74.

Arthur Drayton testified that he was also at the shooting scene. He was asleep on the couch and was awakened by shots being fired. He saw Lee shooting Robinson in the back with a semi-automatic pistol. When Robinson fell, Lee continued shooting. Following the shooting, Lee walked out the door. Drayton then tried but failed to drag Robinson further from the door. Drayton saw a pistol by Robinson. 7RP 586, 588-92. After the shooting, Drayton ran into the backyard to get help. There he saw Darnell Armstrong trying to hide something. 7RP 592.

Dr. Roberto Ramoso performed an autopsy on Robinson. Robinson was 5'10" tall and weighed 249 pounds. He had alcohol, ethanol, Diazepam,

Nordiazempan and cocaine in his blood stream. Robinson had seven gunshot wounds in his back, legs and hand. There was no soot or powder in any of the wounds, so he was not shot within a range of less than two feet. The wounds seemed to indicate that Robinson was shot from his left side and from his back to the front. It would be hard to guess where the shooter and Robinson were in relation to each other when the shooting happened. 8RP 609-17; 619; 632-33; 636-37; 656.

McKinley Williams testified he was paged by Lee Cook after 5 p.m. on April 29, 1994. 8RP 660. Williams testified over objection that Lee was affiliated with the Bloods. 8RP 665. After only a few minutes, Williams responded to the page and called Lee. Lee was scared. Only about two minutes passed between the time Williams talked with Lee on the telephone and when he picked Lee up from his Uncle James' house. When Williams picked Lee up, he was upset and sweating. Lee had a gun with him. 8RP 660-64. He looked "scared," "upset" and "distressed." After 20 to 30 minutes, Lee told Williams what happened. He was still upset, sweating, and trembling and he sounded nervous. After making the statements, Lee appeared to be in shock and didn't talk much. 8RP 665-68. Williams and Lee were together the whole night. At the end of the night, Williams took the gun. Later, Williams left the gun at someone's house and it was seized by the police in an unrelated search. 8RP 660-64.

James Cook testified he is Lee's uncle. He went with Lee to Harris' house so Lee could buy cocaine from Armstrong. Before taking Lee there, James asked if there were Crips around because Lee was a Blood. 8RP 685-88.

James actually made more than one trip to Harris' house that day. He first went to the house about 4:15 p.m. At that time, Harris called Armstrong to see if Armstrong could come over and sell cocaine. James then left and later returned, bringing Lee with him. When they went in, Armstrong was not there. They waited about 5 or 10 minutes and then left. About 6 p.m., they returned a third time. This time Armstrong was there cooking crack cocaine on the stove. 8RP 688-91, 713.

According to James, Lee walked into the living room and stood there. James told Lee to talk to Armstrong about the business he wanted to conduct. Robinson was seated at the dining room table. Over objection, James testified that Robinson was wearing clothing indicating he was a Crip. 8RP 694-95. Lee and Robinson began to talk, but James could not hear the conversation. However, James did not think the conversation was "going to be a sociable conversation." James then told Lee to come take care of business with Armstrong. 8RP 691-93.

James heard the last part of the conversation between Robinson and Lee. According to James, Lee stated, "Hey, I ain't about that" and Robinson replied, "No man, it ain't like that." At that point, Lee went in the kitchen to talk with Armstrong. 8RP 695-96.

Lee and Armstrong discussed a drug purchase. Armstrong was not pleased with the amount of money Lee had. Lee had only \$400. Armstrong wanted \$450.



Negotiations broke down. Armstrong left the kitchen and appeared to summon Robinson. Robinson came into the kitchen and told Lee "This is a jack", which means "This is a robbery." Robinson was carrying a big black gun, like a .45 caliber. Lee dropped his money and, pursuant to Robinson's command, emptied his pockets. Everyone began to tell Robinson to not act as he was acting. Robinson shoved Lee and Lee fell over the stove. Robinson then told Lee to get out. 8RP 697-98, 717.

Lee left. James testified he went into the hallway to see if Robinson was going to shoot Lee. Robinson told James to leave, so he left. Throughout the episode, Robinson's anger escalated. James thought it was possible that Lee would be killed and worried about what his mother, Lee's grandmother, would say. 8RP 698, 718.

Lee was in the hallway. James said to Lee, "Man, forget about it, man. It ain't nothing but some money, man." According to James, Lee replied, "Fuck that, you know." At that point, Lee had a gun in his hand. 8RP 699.

James heard a gun cock, and ran outside. He heard gunshots coming from the house. He panicked and thought about losing his daughter and the \$400. He got into his car, and Lee came out of the house. Lee got in the car and James asked him if he got the money back. According to James, Lee said, "No, but I wasted the motherfucker." James drove to his apartment and they arrived there within seven minutes. Upon their arrival, Lee ran briefly into the bushes before entering the apartment. There, he made three quick phone calls. 8RP 700-03, 722.

Lee remained at the apartment about 10 to 20 minutes, possibly as long as 30 minutes. A friend named Will then picked him up. On cross examination, James estimated that only 17 minutes passed from the shooting until the time Lee left the apartment. 8RP 702, 723.

James was originally charged with the felony of rendering criminal assistance for his acts that night. He was worried about this charge because he thought it could result in his losing the possibility of seeing his daughter. A plea bargain was reached wherein he pled guilty to a misdemeanor and agreed to testify against Lee. James' testimony was also impeached with evidence of a prior shoplifting conviction and his prior crack cocaine use. 8RP 726-38.

Over objection, Tacoma Detective Karen Kelly testified that a phenomenon was occurring in Tacoma and the United States involving gangs aligning themselves with the Crips and Bloods. She testified that these two gangs hate each other and a lot of "quite violent" crimes are committed as a result of this hatred. The two groups set up territories and the instant offense occurred in Crip territory. Bloods identify themselves by using red rags, while Crips use blue rags. 8RP 740-43. Kelly said neither Robinson nor Lee were wearing gang colors at the time of the robbery or shooting. 8RP 744-45. After further overruled objections, Kelly testified that many people in Tacoma had been shot or killed over disrespect for something as simple as not acknowledging an individual or wearing the wrong color. 8RP 740-43.

Forensic Scientist Terry Franklin examined the gun used in this case, as well as 15 fired cartridge cases and the six fired bullets. The gun was a semi-automatic

which meant that the gun could be fired very rapidly. It would not be unusual to shoot six shots in only one second. 9RP 774, 777-78, 789-90.

The 15 cartridge cases matched the test cartridge Franklin made with the gun from this case. Five of the bullets were fired from the gun. The sixth bullet was too damaged to assess. 9RP 792-793.

Franklin testified that if someone had shot down at Robinson from a distance of four to six feet, for example, while Robinson was lying on the floor, he would expect to see some type of unburned powder on Robinson's clothing. He also testified that under such conditions, it would not be unusual for the bullets to have become embedded in the floor. 9RP 826-28.

b. Defense Case

Investigator Michael Stortini testified Robert Harris had told him in an earlier interview that he, Crane and Drayton were all smoking pot before the shooting. Crane told him that Robinson had been known to carry a .380 or .45 caliber gun. 9RP 869-73.

Alphonse Cook, Lee's other uncle and James' brother, testified James used crack cocaine on April 29, 1994, prior to the shooting. The prosecutor's objections to testimony about James' cocaine use on April 28 and in the year preceding the shooting were all sustained. 9RP 875-79.

Gloria Thompson, Alphonse Cook's girlfriend, testified James used crack cocaine just prior to witnessing the shooting at Harris' house. 9RP 887.

Lee testified on April 28, 1994, he met with James and James asked him for some crack. In response, Lee gave James the last of his crack. 9RP 892.

At 3 a.m. on April 29, 1994, Lee came to James' house. They spent the day together. Lee told James he could not find any more crack and James said he could help him get some. They went to Lee's grandmother's house. 9RP 899. While there, James said he was going to go set up a deal to buy more crack. James already appeared to be high on crack. James also had only about two hours of sleep on the night of the 28th. 9RP 892-97. James left and returned about 20 minutes later. 9RP 899.

After waiting about another 20 minutes, Lee and James went to Harris' house, but Armstrong was not there. They waited about 10 to 15 minutes, then left. 9RP 900-01. They returned to Lee's grandmother's house where they waited another 15 minutes. They then returned to Harris' house. Lee was carrying a loaded gun. 9RP 901-02. James and Lee knocked at Harris' house and were invited inside. James went to the kitchen. Someone was asleep on the couch and someone else was sitting on a chair. 9RP 903-04.

On his way to the kitchen, Lee saw Robinson. Robinson said, "What's up, cuz?" Lee replied, "Well, if you know me, I am not a Crip," and "My name is Junior." Lee then tried to shake Robinson's hand. Robinson said "You know, it's all right" and shook his head. 9RP 905-07.

James then called Lee to introduce him to Armstrong. Armstrong was in front of the stove cooking crack. Armstrong and Lee began discussing the price.

Armstrong wanted \$450, but Lee said he only had \$400. Armstrong then said he would give Lee a deal. Lee showed him his money. Lee had \$405, but only showed \$400 because he wanted to keep \$5 for gas money. 9RP 907-11.

Armstrong left the kitchen. He subsequently came back and continued cooking the crack. Then Robinson came in with a gun. Robinson said it was a jack. Lee was scared. Robinson had his finger on the trigger. 9RP 911-14. Robinson told Lee to "Drop your fucking money." Lee threw his money to Robinson. Robinson held the gun to Lee's chest and told him to empty his pockets. Robinson was talking loudly and was not calm. 9RP 915.

Lee turned all of his pockets inside out. Then Robinson said, "I should go ahead and smoke you and I should go ahead and blow your chest out." At this point, Robinson was angry and speaking loudly. Lee said, "Come on, man, just let me go. You have my money. Just let me go." 9RP 916.

Robinson continued to threaten Lee's life. The other people in the apartment asked Robinson to stop. The gun remained pointed at Lee's chest. Lee thought he was going to die. Robinson's finger was on the trigger of the gun. 9RP 917-19. Lee tried to motion to James to try to help him. Lee held his hands up. Robinson continued the death threats. Lee tried to ease out around the stove. Robinson followed him. James just stood there, then began to leave with Lee. The others in the apartment continued to ask Robinson to stop. 9RP 920-21.

Lee backed out of the house. Robinson followed, though allowed some distance to come between the two. Robinson continued to point the gun at Lee's

chest. When Lee got to the threshold and stepped over it, Robinson said, "Fuck it, I will just kill him." At that point, Lee felt fear and drew his gun. Lee saw Robinson's jacket through the door jamb and began shooting. He fired in the direction of the door jamb. He believed that Robinson intended to kill him, and he fired for a couple of seconds. 9RP 922-27. Lee had not intended to kill Robinson. He also did not shoot Robinson as Robinson lay on the floor. 9RP 930.

Lee left the house and went to James' car. He did not know if he had hit Robinson. At James' apartment, Lee directed James to park a couple of blocks away. Lee was still scared. He called McKinley Williams, paging him three times. Williams then came and got him. 9RP 928-30.

On cross examination, Lee was impeached with his two prior drug convictions. The two prior convictions were specifically identified as felony drug offenses. 10RP 939.

Over defense objection, the state was allowed to question Lee about his association with the Bloods. Lee was asked whether "Cuz" was a gang term and he replied it was a term for Crips. Lee also testified that this event was not gang related. 10RP 944, 957.

The defense presented Mike Beakley's expert testimony. Beakley was a former Tacoma police officer. He had been on the police department SWAT team, in the Special Investigations Division which dealt with narcotics, and on the Crack House Abatement Team. He also had experience dealing with gangs. Beakley testified Robinson's tattoo indicated he was a member of a gang on the Hilltop.

Beakley also testified from the reports received on this case, Lee was not wearing anything to show he was a Blood when he went to Harris' house. 10RP 959-65; 968.

Defense counsel wanted to have Beakley testify as to whether the facts as presented by the state indicated that the planned drug sale at Harris' house was really a setup for a robbery of Lee. Counsel argued this evidence would be relevant to help the jury understand Lee's thoughts and perceptions regarding Robinson's behavior. The court denied admission of this evidence because the court believed it was not an area of expertise and was not relevant. 10RP 970-77.

The defense also sought to have Beakley testify about how quickly people react when they perceive a threat to their person. 10RP 980. Counsel argued this evidence was relevant to rebut the state's theory that the number of shots fired reflected premeditation and intent. 10RP 981. The court refused to allow this testimony. The court noted this was "not a situation of perceived threat" and that Lee's mental state was not in issue. 10RP 984.

Beakley was allowed to testify that in his opinion the shooting did not appear to arise out of gang retaliation. He was also allowed to testify that the crime scene was contaminated. 10RP 988.

The defense sought to have Beakley testify about whether, if Lee was shooting from the position the state had attempted to prove he was shooting from, other evidence would have been observed, like bullets embedded in the flooring. Defense counsel stated: "What I am trying to establish with this witness is if, as the state's witness indicated, if they were situated over in this area of the diagram, if you

were inside the threshold of the door and firing a weapon, then there would be evidence in addition to the shell casings, evidence that the weapon was fired from that location. Now, I am not talking about the weapon itself, but evidence of the firing itself." 10RP 990-93.

The court denied admission of this evidence because the defense failed to qualify Beakley as a firearms expert and because Beakley had not fired the specific gun in issue. Counsel offered to qualify Beakley as a firearms expert, but the court did not hear that testimony. Instead, the court questioned Beakley about whether he had conducted test firings with the gun involved in this particular case. Beakley responded: "No. Your Honor, if I can offer something. It doesn't matter what gun is what. If you are going to fire, one, a bullet is going to come out of a barrel, and it has to go someplace, and if you are standing in a location, if you are standing behind firing, a lot of range, the physical evidence at the scene is going to show how if you change your position and start firing rounds, the rounds starting from a different region, they are going to go someplace else, and they have different angles." The court concluded this was not a matter of expertise and refused to allow Beakley's testimony. 10RP 990-95.

The defense also presented the expert testimony of Toxicologist Barry Logan. Logan testified that Robinson's blood showed .05 grams of alcohol per hundred milliliters. Robinson's urine showed the presence of benzodiazepines, such as Diazepam or Valium or Xanax, and cocaine metabolites. Further blood tests revealed Valium at a level of .09 milligrams per liter; Nordizepam at .08



milligrams per liter, and cocaine at .02 milligrams per liter. Test results indicated that some cocaine had been ingested at least 24 hours before death and some other cocaine had been ingested more closely to the time of death. 11RP 1030, 1035-36, 1039, 1043-44. Logan testified that the synergistic effect of Diazepam and alcohol could create loss of concentration, disconnected thought patterns, and exacerbate a person's underlying disposition. Robinson was probably affected by the level of drugs found in his system. 11RP 1042, 1064-65.

The defense attempted to follow Logan's testimony with the expert testimony of Dr. David Moore. Dr. Moore's has a Ph.D. in counseling psychology from the University of Washington, is the Executive Director of Olympic Counseling Services, an adjunct faculty member at University of Puget Sound, and a research associate at the University of Washington. He has a long list of professional accreditations, affiliations, publications and grant awards. He has testified in at least four felony trials as an expert on the capacity of chemically impaired witnesses to provide accurate testimony. CP 77-80.

Dr. Moore would have testified about the effect the various drugs Robinson had taken would have had on his behavior. The court refused to allow this testimony, finding it irrelevant. 11RP 1067, 1071-74, 1081-82.

The defense also sought to have Dr. Moore testify as to how cocaine usage would have affected James Cook's ability to perceive the events in question and accurately report them. 11RP 1082-1102. Dr. Moore opined a cocaine-dependent person who had used drugs for two years would always suffer from an inability to

recall and report accurately a memory of events, especially emotion-laden events. He explained a substantial component of treatment is for such a person to regain accuracy of perception, recall and reporting.

In responding to questions from the court, Dr. Moore said his opinion represented the prevailing view in the scientific community. The Court said, "Well, Counsel, I will be frank, that's news to me. . . ." Dr. Moore went on to state there is a series of studies where cocaine-dependent individuals are unable to recall accurately many different instances.

Both Dr. Moore and defense counsel told the court Dr. Moore had testified about such a person's ability to recall a specific event, both in federal and state court.

The court held it was not going to allow Dr. Moore's testimony. The court said it did not think the testimony "even comes close to meeting the standards" for admission of expert testimony. The court found difficulty "believing the unequivocal nature of this witness's testimony that it is, in fact, supported by the scientific community." 11RP 1090-1102.

## 2. Procedural History

Appellant Lee Cook, Jr. was charged by amended information with first degree murder and unlawful possession of a short firearm. CP 5-8. Lee pled guilty to the firearm charge and was convicted of the lesser included charge of second degree murder. He was sentenced within the standard range and this appeal was timely filed. CP 114-21, 122.

Several pre-trial motions were decided. The defense moved to exclude evidence relating to Lee's gang affiliation as violating the First Amendment right of freedom of association and ER 402, 403 and 404(b). CP 12-17. The state argued the evidence was relevant because part of the motive for premeditation and intent was gang rivalry. The defense argued there was no evidence to show that gang rivalry played any role in the offense and that the gang-related evidence was intended to taint the jury and create prejudice because of the association between gangs and violence. The trial court agreed with the defense that in general evidence of gang affiliation that is not tied to the facts of the crime should not be admitted. However, it held the state could present evidence that gang signs and remarks were exchanged between Lee and Robinson. 2RP 81-99.

The defense also moved to exclude evidence of Lee's prior convictions for impeachment purposes. The two prior convictions were a 1992 and 1993 conviction for possession of a controlled substance. CP 22-27. The trial court denied the motion and allowed use of the prior drug convictions for impeachment.

In deciding to admit the prior drug convictions, the court made a record of its balancing of the relevant factors. It stated that the number of prior convictions did not weigh either in favor or against admission of the priors; that the prior convictions were not remote in time; that the similarity of the drug convictions and

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In the trial itself and over repeated defense objections, evidence relating to gangs in general was admitted, including testimony that gangs are extremely violent and a local and national problem. 8RP 740-43.

the current charges favored admission of those charges; that Lee was young now and when the priors occurred; and that credibility would not be an issue insofar as it would not be contested that Lee was present at the scene of Robinson's death to buy drugs. (The court failed to consider whether Lee's credibility on any other issue before the jury would be of any consequence.) 2RP 47, 75-78.

Before opening statements, the state moved to exclude reference to any evidence that Lee had told McKinley Williams within approximately 50 minutes of the shooting he had acted in self-defense. The state also moved to exclude any reference to the fact that Lee had voluntarily turned himself in to the police shortly after the shooting. 6RP 378-79. The defense argued the statements to Williams should be admitted as excited utterances and that the evidence that Lee turned himself in to the police was relevant. The trial court granted the state's motions, finding the statements were not excited utterances and Lee's turning himself in was not relevant. 6RP 381-83; 385-87; 8RP 674.

During trial, an issue arose concerning a juror. After hearing part of the state's case, Juror Shauna Tressnus disclosed she could not find Lee guilty because she knew, based upon her medical background, that if Robinson had received proper care he would not have died. 9RP 753.

The state moved to have Tressnus dismissed for cause. The defense argued that Tressnus should at least be questioned as to her ability to follow the jury instructions before a decision removing her could be made. The court responded that if Tressnus was questioned she would be so tainted that she would have to be

removed from the jury. The defense then argued that the court should leave the juror on the panel and perhaps give the panel a cautionary instruction that they are not to deliberate or discuss the case until it is submitted to them. 9RP 754-60.

Under questioning from the court, Tressnus stated she would follow the jury instructions even if she disagreed with them. The judge asked " . . . if the Court's instructions on the law are different from the views that you communicated to the judicial assistant would you follow the Court's instruction on the law?" Tressnus answered, "Yes, I would." Upon a rephrasing of the question, Tressnus again answered that she would follow the law, but that she might also write letters in an effort to change the law. She stated:

According to this case, yes, I could follow the laws, but I do feel very strongly, but I am not in agreement with a lot of our laws. I understand that they are the laws, and at this point in time, they are the laws that have to be followed, but I, as a civilian, and as a person in this county, would like to see some of those laws changed."

9RP 764-66.

After argument from both sides, the court dismissed Tressnus because the judge did not believe her when Tressnus said she would follow the jury instructions.

The court stated: "I am afraid that -- I am just of the feeling that if I leave her on I am just virtually assuring us of a hung jury." 9RP 769.

Following this decision, the defense moved for a mistrial. The court denied the motion. 9RP 770.

At the end of the state's case, the defense renewed its motion to allow Williams' testimony about Lee's hearsay statements to him as excited utterances.

9RP 835. The court again denied the motion. Even though, according to the court, only 38 to 49 minutes passed between the shooting and the hearsay statements, that amount of time led it to the conclusion that the statements were not spontaneous. The court also expressed concern about what Lee might have been doing during the time lag. 9RP 845-47.

During the defense opening statement, counsel mentioned that Lee had voluntarily turned himself in to the police. Counsel had apparently misunderstood the court's earlier ruling denying admission of such evidence. The opening was interrupted and the jury excused. Once counsel understood that the evidence would not be admitted, he moved for a mistrial on the basis of a violation of Lee's Sixth and Fourteenth Amendment rights to a fair trial. Defense counsel stated:

I believe that the Court has consistently made evidentiary rulings that have prevented us from presenting the whole picture with respect to Mr. Cook's case, and particularly with respect to his ability to present testimony and evidence concerning prior excited utterances which the Court has previously ruled on, which will be excluded, and also evidence which I find under Evidence Rule 401 to be relevant evidence with respect to his motive for turning himself in, and of course, the State is not going to present evidence that Mr. Cook fled the jurisdiction. He didn't flee the jurisdiction. He turned himself in, and he turned himself in within three days from the day of the shooting.

I believe that this evidence is relevant, and I believe that, based on the evidentiary rulings of the Court, that Mr. Cook's Sixth Amendment Rights to a fair trial are being violated, and that simply is the basis of my motion for a mistrial.

9RP 858-63.

The court denied the motion. 9RP 863.

The court gave, over defense objection, a proposed state instruction based upon State v. Janes, 121 Wn.2d 220, 240, 850 P.2d 495 (1993). The instruction stated in part that the right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or revenge. 11RP 1115-19; 1125.

The court refused to give a defense proposed instruction on whether there is a duty to retreat. The instruction proposed followed the WPIC language and stated:

It is lawful for a person who is in a place where that person has a right to be and who had reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP 42-76; 11RP 1130-31.

The court's refusal to give this instruction eliminated defense's ability to effectively respond to the following arguments made in closing by the state:

. . . That pause there in the hallway when James Cook says, "It's not worth it. It's just money." In essence, let's get out of here. No more trouble. Let's just go. And Lee Cook's response, the obscenity and then cocking the gun shows he had decided what to do. He had thought about it, and he was going to go do it. Premeditation. . . .

11RP 1140.

. . . But, if nothing else, that pause there in the foyer in the hallway where his uncle says, "It's not worth it. Let's get out of here," and the Defendant responds with the obscenity and he cocks the gun. That shows he had the chance not to act against Troy Robinson, and he decided to do it, and he went in and did it. . . .

11RP 1148.

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The Janes instruction and the rejected "no duty to retreat" instruction are included as appendices B and C, respectively.

. . . He certainly wasn't going to run away from trouble. He was going to finish it. . . .

11RP 1174.

C. ARGUMENT

1. THE TRIAL WAS FUNDAMENTALLY UNFAIR AND SEVERAL ERRORS INDIVIDUALLY AND CUMULATIVELY REQUIRE REVERSAL OF THE CONVICTION.

Lee Cook's trial was a series of errors. Throughout the trial, the court seemed guided by the idea that Lee was guilty and ought to be convicted. Most telling were the judge's comments when deciding to dismiss a juror before the state had completed presentation of its case: "I am afraid that -- I am just of the feeling that if I leave her on I am just virtually assuring us of a hung jury." Clearly, the judge thought that all the jurors should vote to convict, even though he had not yet heard the entire case and even though he was not the fact finder. Every evidentiary and procedural question seemed to be resolved based upon the judge's theory that Lee ought to be convicted and the case should be run in a manner to guarantee that result.

Each major error at trial will be discussed individually. The errors individually require reversal of Lee's conviction. But, even if each error alone does not require reversal, the cumulative error doctrine demands reversal.

It is well established that numerous trial errors will require a reversal if their combined effect deprived the defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 728, 684 P.2d 668 (1984); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d



426 (1994); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In Suarez-Bravo, the court reversed the conviction because of the cumulative effect of prosecutorial misconduct and improper evidence regarding the character of the defendant's neighborhood and his ethnicity. Prejudice is more likely where the defendant's credibility is key, and the case basically comes down to a swearing contest between the state's and defense witnesses. State v. Suarez-Bravo, *supra*, 71 Wn. App. 367-68; State v. Padilla, 60 Wn. App. 295, 301, 846 P.2d 564 (1993).

This case was basically a swearing contest between the two sets of witnesses. If the jury believed James, Lee could have been convicted. If the jury believed Lee, he was acting in self-defense and should have been acquitted. Under these circumstances, it must be concluded that the combined prejudicial effect of the errors at trial unfairly tipped the balance in the state's favor. Reversal is therefore required both on the basis of the individual errors and their cumulative effect.

2. EVIDENCE REGARDING GANGS WAS ADMITTED IN VIOLATION OF CONSTITUTIONAL GUARANTEES OF FREEDOM OF ASSOCIATION, THE EVIDENCE RULES, AND CONSTITUTIONAL GUARANTEES OF DUE PROCESS.

The state presented no evidence to demonstrate the offense was gang related. Neither Lee nor Robinson were wearing gang colors. No gang signs were flashed. All the evidence indicated this was simply a drug sale and robbery that went bad. It was only coincidence that Lee and Robinson were members of opposing gangs. Given this, admission of evidence about gangs, the violent crimes gang members commit, the nationwide scope of the gang problem, and Lee's gang membership, all

over defense objection, was a violation of the First Amendment of the U.S. Constitution, Art. 1, § 4 of the Washington Constitution, ER 402, 403, and 404(b), and the due process clauses of the federal and state constitutions. U.S. Const. amends. 5, 14; Wash. Const. art. 1, § 3.

a. Admission of Gang Evidence Violated The Constitutional Right Of Freedom Of Association.

The issue in this case is whether evidence of Lee's gang affiliation and general evidence about the violence committed by gangs was admissible given no other evidence indicating that the offense might have been gang related. Dawson v. Delaware, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992), resolves this issue. There the Supreme Court held, "the First and Fourteenth Amendments prohibit the introduction in a capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence has no relevance to the issues being decided in the proceeding." 112 S. Ct. at 1095.

The Supreme Court began its analysis by noting that the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs. See Aptheker v. Secretary of State, 378 U.S. 500, 507, 84 S. Ct. 1659, 1664,

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The state argued at trial that Lee's gang affiliation provided a motive for him to kill Robinson. However, no evidence, short of the coincidence that Lee and Robinson were members of opposing gangs, supported this motive theory. If the state had presented evidence, for example, that Lee made statements that he had to kill Robinson because Robinson was a Crip, or that Lee was ordered by the Bloods to kill a Crip, then the state's motive theory would make sense and evidence of Lee's gang affiliation would have been admissible. The state must be required to show some sort of evidence specifically tying gang membership to motive. Otherwise, whenever any gang member is tried for any offense, the state can assert that gang membership is the motive for the offense and introduce gang evidence. This

12 L. Ed. 2d 992 (1964); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460, 78 S. Ct. 1163, 1170, 2 L. Ed. 2d 1488 (1958). However, the First Amendment does not erect a per se barrier to admission of evidence concerning one's beliefs and associations in a criminal proceeding. Such evidence is admissible where it is relevant. Where the evidence is not relevant, but rather proves nothing more than abstract beliefs or the possibility of unproven unrelated misconduct, admission of the evidence violates the First and Fourteenth Amendments. 112 S. Ct. at 1097-99.

Washington's Supreme Court has reached a like conclusion. State v. Johnson, 124 Wn.2d 57, 873 P.2d 514 (1994), considered the propriety of admission of evidence of Johnson's association with the Black Gangster Disciples (BGD) at trial and at sentencing in a case where Johnson, a member of the BGD, fired a gun at two cars driven by Crips. The evidence established that the shooting was motivated by Johnson's gang membership and his desire to keep his gang turf free of Crips. The Court wrote, "If [gang related] evidence were not relevant to the issues at trial and at sentencing, the punishment would then constitute a violation of the First Amendment right of freedom of association as declared by the United States Supreme Court in Dawson v. Delaware. However, the evidence is relevant to the issues in this case." 124 Wn.2d at 67 (footnote omitted).

This analysis is in accord with State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), cert. denied, 486 U.S. 1061 (1987), reh. denied, 487 U.S. 1263 (1988). In

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result would violate the state and federal constitutions and the rules of evidence.

Rupe, the Court stated that constitutionally protected behavior cannot be the basis of criminal punishment. To protect the integrity of constitutional rights, the Court noted that two related propositions had been developed. First, the state can take no action which will unnecessarily "chill" or penalize the assertion of a constitutional right. Second, the state may not draw adverse inferences from the exercise of a constitutional right. Thus, the Court held evidence of Rupe's gun collection could not be admitted in his death penalty sentencing proceeding where the collection was unrelated to issues properly raised at sentencing. 101 Wn.2d at 703-08.

The corollary to the Rupe analysis is that "[E]ven constitutionally protected materials may be admissible if the evidence is relevant." State v. Kendrick, 47 Wn. App. 620, 627, 736 P.2d 1079 (1987); State v. Neslund, 50 Wn. App. 531, 565, 749 P.2d 725 (1988). Consequently, the resolution of whether constitutionally protected material is admissible turns on whether the evidence is relevant. Kendrick, 47 Wn. App. at 627.

In this case, the evidence relating to gangs and Lee's gang membership was not relevant. Nothing indicated that the offense was gang motivated or gang related. Given that the evidence was not relevant, its admission violated the First and Fourteenth Amendments and their state counterparts.

The question then is whether this constitutional error requires reversal of Lee's conviction. Washington courts have not yet decided what standard of review applies in this type of case. In Johnson and Kendrick, no error was found; therefore the question did not have to be addressed. In Rupe, the Court rejected the State's

argument that the improperly admitted evidence resulted in no prejudice to Rupe and remanded for a new sentencing proceeding. Rupe, 101 Wn.2d at 708.

The U.S. Supreme Court has left open the proper standard of review. Dawson, 112 S. Ct. at 1099. However, Justice Blackmun, in his concurring opinion in Dawson, argued against adopting a harmless error analysis:

Because of the potential chilling effect that consideration of First Amendment activity at sentencing might have, there is a substantial argument that harmless-error analysis is not appropriate for the type of error before us today. See Rose v. Clark, 478 U.S. 570, 587, 106 S. Ct. 3101, 3111, 92 L. Ed. 2d 460 (1986) (STEVENSON, J., opinion concurring in the judgment) ("[V]iolations of certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial"). 112 S. Ct. at 1100 (Blackmun, J., concurring).

Justice Blackmun's argument should be adopted by this Court. Freedom of association is vital to a free society. If evidence of participation in or association with unpopular groups can be used to convict in cases where such evidence is not relevant, then participation in groups outside the mainstream will be effectively chilled. Once this occurs, one of the primary components of political and social freedom is lost. Applying this heightened standard of review, a new trial is necessary because the gang evidence was admitted in violation of the First and Fourteenth Amendments.

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On remand, the Delaware court found that it could not say that the error was harmless beyond a reasonable doubt and therefore remanded for a new penalty hearing. Dawson v. State, 608 A.2d 1201, 1202 (Del.Supr. 1992).

Even if a harmless error standard is applied, a new trial will be necessary in this case. Very little of the state's evidence was inconsistent with Lee's claim of self-defense. Although Robinson was shot in the back, it is possible he turned when he realized that Lee was going to act in self-defense. In assessing the evidence relative to Robinson's wounds, it is necessary to remember that Lee's gun could have fired 15 rounds in only three seconds, and that the state's own expert, Dr. Ramoso, testified it would be difficult to guess where Lee and Robinson were in relation to each other when the shooting occurred.

The only other evidence which might contradict a claim of self-defense was James' testimony that Lee was in the hallway and returned to shoot Robinson in anger over the stolen money. However, James' testimony was subject to substantial doubt as he was on crack at the time of the shooting, was a long-term cocaine addict, and his testimony may have helped him avoid his own felony conviction.

Given the evidence mustered by the state, it is not possible to say that the improperly admitted evidence of gang affiliation and gang violence did not influence the verdict. This conclusion is compelled by the high degree of prejudice associated with the evidence. As stated by the Alabama Supreme Court:

In light of the massive media coverage of gang violence in contemporary society, the assertion that a defendant's membership in a gang . . . will not prejudice him in the eyes of the jury is simply untenable.

Ex Parte Thomas, 625 So.2d 1156, 1157 (Ala. 1993).

Even under a harmless error analysis, reversal and remand for a new trial are necessary.

b. Admission Of Gang Related Evidence Violated The Evidence Rules.

Admission of the gang evidence was improper because it violated the Rules of Evidence. ER 402 provides:

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Kendrick, 47 Wn. App. at 627.

In this case, the court found that evidence about gangs in general would not be relevant. Nonetheless, the court allowed Karen Kelly to testify about the violent behavior of gangs and the nationwide and Tacoma-wide scope of the gang problem. No one could rationally argue that evidence about how gangs in general commit numerous violent crimes tended to prove any fact of consequence to the state's case against Lee. That evidence was clearly irrelevant and not admissible.

Even if this evidence had some minimal relevance, it was unduly prejudicial pursuant to ER 403. ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Additionally, the gang-related evidence should have been excluded under ER 404(b). ER 404(b) provides: "Evidence of other crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show action in conformity therewith." Gang evidence should not have been admitted to show that Lee acted in conformity with the reputation of gang members.

This conclusion is consistent with that reached in United States v. Roark, 924 F.2d 1426 (8th Cir. 1991). In Roark, the defendant, who was charged with a drug offense, was a member of the Hell's Angels. Beginning in voir dire and throughout the trial, the government presented evidence and argument regarding the Hell's Angels' general reputation for drug-related activities. The appellate court held that this evidence did nothing to prove whether Roark was guilty. The Court concluded:

Evidence of uncharged misconduct to show criminal propensity is inadmissible not because it is logically irrelevant, but because it is inherently and unfairly prejudicial. It deflects the jury's attention from the immediate charges and causes it to prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged. Michelson v. United States, 335 U.S. 469, 476, 69 S. Ct. 213, 218-19, 93 L. Ed. 168 (1948); 2 Weinstein's Evidence, § 404[04]-28 (1986). Therefore, the government's attempt to tie Appellant's guilt directly to his association with the Hells Angels Motorcycle Club constitutes reversible error.

924 F.2d at 1434. See also, United States v. Singleterry, 646 F.2d 1014, 1018 (5th Cir. 1981) ("[A] defendant's guilt may not be proven by showing he associates with unsavory characters"); State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987) ("When considering misconduct which does not rise to a level of criminal activity, but which may nonetheless disparage the defendant, extreme caution must be used



to avoid prejudice"); State v. Ballantyne, 128 Ariz. 68, 623 P.2d 857 (Ariz.App. 1981) (evidence of affiliation with the Hell's Angels inadmissible because it was evidence of bad character which could not be used to prove defendant acted in conformity therewith).

Evidentiary issues are subject to an abuse of discretion standard of review. Kendrick, 47 Wn. App. at 627. Where a trial court's ruling is based on untenable grounds, there is an abuse of discretion. State v. Clark, 78 Wn. App. 471, 477, 898 P.2d 854 (1995). In this case, the trial judge himself found that evidence relating to gangs and their propensity for violence was not relevant. However, when the state presented that evidence, the judge disregarded his own prior conclusion and allowed the testimony. Consequently, there was an abuse of discretion.

Similarly, even evidence that Lee was in a gang should have been excluded. The evidence was not relevant. Even if minimally relevant, it was overwhelmingly prejudicial. And, it was evidence of other wrongs used to show that Lee acted in conformity therewith. As in Myers and Ballantyne, an abuse of discretion occurred. Moreover, the error was not harmless. As set out above, the evidence contrary to Lee's claim of self-defense was minimal. The improperly admitted gang evidence was prejudicial and reversal of the conviction is required.

c. Admission Of Gang-Related Evidence Violated Constitutional Guarantees of Due Process.

Admission of the gang related evidence also violated constitutional due process guarantees. Impermissible use of constitutionally protected conduct is a

violation of due process. State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995). See also, Rupe, 101 Wn.2d at 708. As set out above, admission of the gang-related evidence violated Lee's right of freedom of association.

Moreover, admission of this evidence was prejudicial error no matter what standard of review is applied. Therefore, on due process grounds, as well as First Amendment and Evidence Rules grounds, reversible error was committed in admitting the gang evidence.

3. PRIOR DRUG CONVICTIONS HAVING NO BEARING ON LEE'S VERACITY WERE IMPROPERLY ADMITTED FOR IMPEACHMENT PURPOSES.

Very little of the state's evidence was inconsistent with the theory that Lee acted in self-defense. However, after hearing that Lee had two prior felony drug convictions, the jury might have believed that because Lee was a felon and had been involved in drug offenses before this drug deal gone bad, he must be guilty. This is the unfair result of admitting a conviction that had no bearing on veracity.

ER 609(a) governs impeachment of a defendant with prior criminal convictions. The rule provides:

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by a public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

In making its determination about the admissibility of a crime under ER 609(a)(1), the court must consider:

(1) the length of the defendant's criminal record; 2) remoteness of the prior conviction; 3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime.

State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980).

The analysis of the Alexis factors must be explicit, thorough, and on the record. State v. King, 75 Wn. App. 899, 913, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995); State v. Gomez, 75 Wn. App. 648, 656, 880 P.2d 65 (1994). See also, State v. Jones, 101 Wn.2d 113, 121, 677 P.2d 131 (1984), overruled on other grounds, State v. Brown, 111 Wn.2d 124, 761 P.2d 588, adhered to on reh'g, 113 Wn.2d 520, 728 P.2d 1013, 787 P.2d 906, 80 A.L.R.4th 489 (1989).

Although the court here balanced most of the Alexis factors, which it found weighed for and against admission, it failed to properly articulate its analysis of factors 3, 5 and 6. The court's failure to properly conduct this balancing was reversible error. King, 75 Wn. App. at 910-11.

Not every felony is probative of veracity; were it otherwise, there would be no need for ER 609 or the requirement that the court weigh the Alexis factors. The state would be allowed to introduce evidence of every felony, regardless of its bearing on credibility. Recognizing that not all felonies are probative of veracity, the appellate courts have imposed a mandatory duty on the trial courts. Before admit-

ting evidence of a prior conviction under ER 609(a)(1), the trial court is required "to articulate how the specific nature of the prior felony makes it one of the few offenses not involving dishonesty or false statement that nevertheless has probative value." King, 75 Wn. App. at 913.

The trial court did not fulfill its duty here. Instead of explaining how the nature of the prior drug conviction affected Lee's credibility, the court simply stated that the similarity of the prior drug offenses and the current offense involving a drug deal favored admission of the prior offenses. This was perhaps because Lee's prior convictions were not probative of veracity.

Evidence of prior convictions is inherently prejudicial.

Statistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record. H. Kalven & H. Zeisel, The American Jury 146, 160-69 (1966). It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again.

Jones, 101 Wn.2d at 120. Moreover, contrary to the court's analysis in this case, the greatest prejudice results when the prior conviction is identical or similar to the charged offense. 101 Wn.2d at 121.

Furthermore, it has long been recognized that narcotics convictions have limited value with regard to determining a defendant's veracity. See United States v. Puco, 453 F.2d 539, 543 (2nd Cir. 1971), cert. denied, 414 U.S. 877 (1973); United States v. Brown, 409 F.Supp. 890, 894 (W.D.N.Y. 1976) (an old narcotics conviction has little bearing regarding the credibility of a witness but possesses great prejudice to a defendant-witnesses charged with a parallel criminal charge).

The court also failed to recognize the centrality of the credibility issue. If the jury did not find Lee credible, it could not believe that he acted in self-defense. Lee's prior convictions told the jury nothing about his likely veracity. Moreover, given the role drugs played in this offense, and the centrality of the credibility issue, the priors were extremely prejudicial. Therefore, their admission was improper.

This error also requires reversal of Lee's conviction. Reversal is required when it can be shown that, within reasonable probabilities had the error not occurred, the outcome of the trial would have been materially affected. State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). Here, little of the state's evidence was inconsistent with the theory of self-defense. Had the jury not known that Lee was already convicted of two felonies, it might not have convicted him. Therefore, reversal is required.

4. RELEVANT ADMISSIBLE DEFENSE EVIDENCE WAS IMPROPERLY EXCLUDED FROM TRIAL.

Throughout the trial, defense efforts to present evidence were thwarted. The defense was not allowed to present evidence that Lee told Williams within 50 minutes of the shooting that he shot in self-defense. Evidence that Lee turned himself in to the police, consistent with his belief that he was properly acting in self-defense, was excluded. Evidence regarding James' cocaine addiction was excluded. Expert testimony about the effect this cocaine addiction had on James' ability to testify accurately was excluded. Expert testimony about whether the events preceding the shooting were part of a typical robbery setup as opposed to a typical

gang-related killing was excluded. This testimony was also intended to set out for the jury how Lee understood the situation and explain the reasonableness of his level of fear. Expert testimony about reaction times when an individual perceives a threat to his person to demonstrate that the timing in the shooting was consistent with an act of self-defense was excluded. Expert testimony rebutting the state's attempts to prove that Lee stood over Robinson and fired into his back as Robinson lay on the floor was excluded. Expert testimony regarding the effects drugs and alcohol would have had on Robinson's behavior to demonstrate that Lee was reasonably afraid for his life and acting in self-defense was excluded.

By the time the court finished excluding all this evidence, Lee was left unable to present a defense. The court's evidentiary rulings violated the Rules of Evidence and were an abuse of discretion. Additionally, the court's rulings denied Lee his state and federal constitutional due process rights to present a defense and witnesses in support of that defense. For these reasons, reversal of Lee's conviction and remand for a new trial are necessary.

a. Relevant Statements Falling Within The Hearsay Exception For Excited Utterances Was Improperly Excluded.

The defense sought admission of statements Lee made to Williams within 50 minutes of the shooting to the effect that he had shot in self-defense. The court erroneously found these statements did not fall within the hearsay exception for excited utterances.

Evidence Rule 803(a)(2) dictates that an excited utterance should not be excluded by the rule against hearsay. ER 803(a)(2) defines an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Lee's statements to Williams were excited utterances under this definition and therefore were improperly excluded from the trial.

Williams picked Lee up approximately 30 minutes after the shooting. Twenty minutes later, Lee made statements to Williams about what had happened and that he had shot Robinson in self-defense. The record establishes that when he made these statements, Lee remained under the stress of excitement of the events he was describing.

Williams testified Lee sounded upset and scared when he spoke to him on the telephone. When Williams saw Lee two or three minutes later, Lee was "upset," "running around," and "sweating." 8RP 666. When Lee and Williams left in Williams' car, Lee was still sweating, and looked "scared," "upset," and "distressed". 8RP 667. When Lee told Williams about the shooting approximately 20 minutes later, he was still upset and sweating, was trembling, and sounded nervous. After he finished his description of the events, Lee "appeared to be in shock" and "didn't talk much." 8RP 668. Williams' testimony about Lee's demeanor before, during, and after making the excluded statements clearly established Lee's extreme and continuing agitation caused by the events he was relating.

The trial judge conceded the evidence of Lee's excited state, but refused to admit the statements because of the time lag between the shooting and when the statements were made, and because of "what [Lee] was doing" during that time. 9RP 846. Neither of these factors, however, provide proper grounds for excluding Lee's statements.

First, the time period between the shooting and Lee's statements was approximately 50 minutes. Prior appellate cases establish that such a period of delay does not preclude application of the excited utterance rule. In State v. Flett, 40 Wn. App. 277, 699 P.2d 774 (1985), statements were made 2½ and 7 hours after an alleged rape. The admission of these statements as excited utterances was upheld on grounds that the events in the intervening period "were all part of a 'continuous process' satisfying the elements of the excited utterance exception." 40 Wn. App. at 287. In State v. Thomas, 46 Wn. App. 280, 730 P.2d 117 (1986), statements were made 6 to 7 hours after the speaker had been the victim of statutory rape. During that time, the victim had walked to a friend's house five blocks away. Despite the time and distance factors, the court recognized that the victim was still upset when she made the statements. 46 Wn. App. at 284-85. In State v. Strauss, 119 Wn.2d 401, 832 P.2d 78 (1992), the court upheld admission of statements made up to 3½ hours after the victim had fled and met a police officer at a gas station. The court held that the passage of time between the startling event and the declarant's statement is only a factor to be considered in determining whether the statement is an excited utterance. It is not dispositive. 119 Wn.2d at 417. "The courts have accordingly



allowed statements made several hours after startling events where there were not intervening influences that might have rendered them unreliable." Thomas, 46 Wn. App. at 284.

Second, the trial court attached importance to the testimony that Lee ran into the bushes when he left his uncle's car and that Lee made three quick phone calls. However, none of this testimony indicates an intervening influence that would have compromised the reliability of Lee's statements. The fact that Lee ran into the bushes, without apparent reason, is not evidence of a calm or reflective state of mind. Rather, it evidences his continued state of excitement. Further, the testimony did not indicate that Lee spoke to anyone when making the three quick calls. In fact, the evidence was that the calls were for the purpose of paging Williams. The act of making repeated calls in this manner once again establishes, rather than disproves, Lee's continuing state of distress and excitement.

Under the case law, the refusal to admit Lee's excited utterances to Williams was an abuse of discretion.

b. Evidence Was Improperly Excluded In Violation Of The Evidence Rules Concerning Relevancy.

Evidence that Lee voluntarily turned himself in to the police was excluded because the court found it was not relevant. The court also held that evidence regarding James's cocaine addiction in the years preceding the shooting, including cocaine use at any time up to 24 hours before the shooting, was not relevant. These holdings were erroneous and an abuse of discretion. See State v. Hudlow, 99

Wn.2d 1, 14, 659 P.2d 514 (1983) (where incorrect evidentiary rulings eviscerate the defense, an abuse of discretion will be found).

Evidence of flight has consistently been held relevant to show consciousness of guilt. State v. Harris, 34 Wn. App. 649, 663 P.2d 854, affirmed, 102 Wn.2d 148, 685 P.2d 584 (1983); State v. Hebert, 33 Wn. App. 512, 656 P.2d 1106 (1982). Surely, if evidence of flight can demonstrate consciousness of guilt, evidence that an individual voluntarily turned himself in to the police can demonstrate the individual's belief that he had properly acted in self-defense and therefore should cooperate with the police.

The state argued below, and will undoubtedly argue here, that Lee's turning himself in could have been a defense tactic regardless of Lee's consciousness of guilt or innocence. However, this argument does not fit with the evidence. Lee on his own initiated the process of turning himself in. Given that circumstance, his action was not a defense tactic. It was evidence of Lee's belief he had acted properly. Moreover, the state would have been free to show that Lee did not have the frame of mind indicated by evidence that he voluntarily turned himself in. Thus, even under the best case scenario for the state, the state's objections to the evidence go to its weight and not its relevance. The evidence was relevant and the trial court erred in refusing to admit it.

Likewise, evidence of James' cocaine addiction and use in the years and days and hours preceding the shooting was relevant. James was the primary witness

against Lee. Evidence tending to show that James lacked the ability to perceive and accurately recall the events about which he testified was clearly relevant.

With regard to the admissibility of James' cocaine addiction, this case is like State v. Brown, 48 Wn. App. 654, 739 P.2d 1199 (1987). In Brown, the issue was the admissibility of evidence of a rape prosecutrix's ingestion of LSD prior to the alleged crime and the effect the LSD would have had on her perceptions and moods. The Court of Appeals found that this evidence was relevant and crucial to the defense and had been improperly excluded from the trial. The Court quoted a New York case addressing a similar situation:

Here the evidence [of a witness' heroin use] was offered on the issue of the witness' ability to perceive, retain and transmit certain events. On that issue the testimony was proper. That was particularly so since the issue of the witness' ability to perceive, etc., was not only not collateral, but critical to both parties' case.

Brown, 48 Wn. App. at 660 (quoting People v. Ortiz, 40 A.D.2d 857, 857-58, 338 N.Y.S.2d 8, 10 (1972)).

As will be fully discussed below, expert testimony the defense intended to offer demonstrated that people who abuse cocaine lose the ability to accurately perceive, recall and report events. This evidence was crucial to the defense because if the jury doubted James' testimony that Lee had left the area of immediate danger and then returned in anger over the money to shoot Robinson, the jury may well have found Lee acted in self-defense. This would have been especially true if the defense had been allowed to present expert testimony tending to establish that Lee did not stand over Robinson and fire into his back as the state's evidence suggested.

As in Brown, the evidence of drug use was relevant and should not have been excluded.

c. Expert Testimony Was Improperly Excluded.

The trial court also refused admission of almost all of the defense's expert testimony: whether the events preceding the shooting appeared to involve a robbery setup; reaction times when an individual perceives a threat to his person; whether the physical evidence was consistent with the state's theory that the shooter stood over Robinson and fired into his back as he lay on the ground; how drug and alcohol use would have affected Robinson's actions immediately preceding the shooting; and the impact of cocaine abuse on James' ability to perceive and recall the events in issue. Each of these rulings was an abuse of discretion.

The rules for the admission of expert testimony were recently discussed in State v. Jones, 71 Wn. App. 798, 813-815, 863 P.2d 85 (1993). Expert testimony is admissible under ER 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

This rule requires the witness be qualified as an expert, any opinion testimony must be based on a theory generally accepted by the scientific community, and the testimony must be helpful to the fact-finder. Education and practical experience may qualify a witness as an expert.

. . .

An expert's scientific or technical testimony must be based upon a scientific principle or explanatory theory that has gained general acceptance in the scientific community.

. . .

However, if expert testimony does not concern novel theories of sophisticated or technical matters, it need not meet the stringent requirements for general scientific acceptance.

State v. Jones, supra (citations omitted). Applying this rule to this case, it is apparent that the trial court erred in excluding the defense expert testimony.

First, expert testimony that the events prior to the shooting looked like a robbery setup was excluded on the basis that this was not an area of expertise and that it was not relevant. This ruling was erroneous.

This was an area of expertise, insofar as it was an area outside common experience. "Expert testimony is unnecessary when 'the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment . . .'" Seattle v. Personeus, 63 Wn. App. 461, 464, 819 P.2d 821 (1991) (quoting State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647, review denied, 104 Wn.2d 1026 (1985)). Conversely, expert testimony is appropriate when the subject matter is not a matter of common knowledge. Most people, fortunately, are not victims of armed robberies and are not familiar with common ways of setting up robberies. Expert testimony on this topic would have been helpful to the jury in accord with ER 702.

This evidence was also relevant. At issue in a self-defense case is the defendant's perceptions. The legitimacy of the defendant's conduct must be

evaluated in light of all facts and circumstances known to him at the time of the shooting.

[Jurors are to] put themselves in the place of the appellant, get the point of view which he had at the time of the tragedy, and view the conduct of the [deceased] with all its pertinent sidelights as the appellant was warranted in viewing it. In no other way could the jury safely say what a reasonably prudent [person] similarly situated would have done.

State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993), (quoting State v. Wanrow, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977) (plurality of Utter, J.), quoting State v. Tribett, 74 Wash. 125, 132 P. 875 (1913)).

If the jurors in this case were to be able to put themselves in Lee's place they would have to evaluate all that preceded the shooting from Lee's perspective. Knowledge that the preceding events looked like a typical robbery setup would allow the jury to assess the danger to Lee from Lee's point of view. Certainly, the level of danger as perceived by Lee must have been increased by the knowledge that he had been the victim of a setup crime, thus others in the house, who were likely part of the setup, would not come to his aid in protecting him from Robinson. This evidence was relevant in assisting the jury to place themselves in Lee's position at the time of the shooting.

The court also refused to admit expert testimony about reaction times when people perceive threats to their personal safety, holding that this was not a situation of perceived threat and that reaction time deals with mental states which would not be relevant to this case. This ruling ignores the nature of a claim of self-defense.

In assessing a self-defense claim, the legitimacy of the defendant's conduct must be evaluated in light of all the facts and circumstances known to him at the time of the shooting. State v. Despenza, 38 Wn. App. 645, 649, 689 P.2d 87 (1984). The right to use deadly force is dependent upon what a reasonably cautious and prudent person would have done and whether the defendant reasonably believed he was in danger of bodily harm. State v. Theroff, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980). In assessing Lee's claim of self-defense, it was important for the jury to know that the timing of Lee's response to Robinson's continuing death threats was consistent with that of any reasonably prudent person faced with Robinson's behavior. The court was incorrect in excluding this evidence on the basis that Lee's mental state was not in issue.

The court next excluded expert testimony regarding the physical evidence left at the scene. The defense sought to have its expert testify that the physical evidence including the locations of bullets and casings was not consistent with the state's theory regarding Lee's position during the shooting. This testimony was crucial to the defense because it would have rebutted the theory that Lee shot into Robinson's back while Robinson lay helpless on the floor. The court found this type of analysis was not an area of expertise.

Both the prosecution and the defense have traditionally relied on testimony from expert witnesses on guns, ballistics and other sorts of weapons to determine the position of various individuals involved in homicide cases. See, Annotation, Admissibility, In Homicide Prosecution, Of Evidence As To Tests Made To

Ascertain Distance From Gun To Victim When Gun Was Fired, 11 A.L.R.5th 497 (1994). While such testimony has occasionally been excluded because the expert conducted tests which were not sufficiently similar to the conditions at the time of the shooting and then wished to draw conclusions from those tests about events at the shooting, no court that defense counsel is aware of has held that crime scene analysis and ballistics evidence is not an area of expertise. Id. The trial court was simply wrong in concluding that crime scene analysis is not an area of expertise.

The court next refused to allow the defense to present expert testimony regarding the effects which the various drugs Robinson had taken had on his behavior just prior to the shooting. Again, the court found this evidence was not relevant. The court believed Robinson's behavior was not in issue, only Lee's. However, this ruling again overlooked the nature of a claim of self-defense. In assessing a claim of self-defense, the jury must consider the behavior of the decedent. For it is only in considering the behavior of the decedent that the jury can determine if the defendant was justified in defending himself. Clearly this evidence was relevant and should have been admitted.

Finally, the court refused admission of expert testimony on the impact of long-term cocaine abuse on James' ability to perceive and recall events because it did not believe this was an area of expertise, did not believe the expert was qualified, and did not believe the expert when he stated that cocaine dependent individuals are inaccurate in their recall and reporting of events, particularly emotionally laden events. Each of these conclusions was incorrect.



The effect of drug use on perception and recollection has long been recognized in Washington as an area of expertise. State v. Smith, 103 Wash. 267, 174 P. 9 (1918), held that where the prosecuting witness was under the influence of morphine at the time of the alleged offense and her accusation, the defense was entitled to prove by expert testimony the effect of the drug upon her mind and memory. State v. Schuman, 89 Wash. 9, 153 P. 1084 (1915), recognized that if a witness was properly proven to be a cocaine addict, expert testimony on the effect of cocaine on the ability to distinguish truth from falsehood would have been admissible. State v. Robinson, 12 Wash. 491, 497, 41 P. 884 (1895), held that expert testimony about morphine would have been admissible if it had gone to the effect upon the witness' mental faculties. The trial court erred in reaching its contrary conclusion.

The trial judge also refused the evidence regarding the impact of cocaine abuse on James' ability to perceive and recollect events on the basis that the defense expert was not qualified. A witness may be qualified as an expert by his knowledge, skill, experience, training or education. ER 702. Once the basic requisite qualifications are established, any deficiencies in an expert's qualifications go to the weight, rather than the admissibility, of his testimony. Keegan v. Grant County Pubic Utility District No. 2, 34 Wn. App. 274, 661 P.2d 146 (1983).

Dr. Moore's qualifications included extensive education and professional experience. Moreover, he had testified repeatedly as an expert on this topic in state and federal courts. The court pointed to no specific shortcomings in Dr. Moore's

qualifications. Dr. Moore was a qualified expert on the effects of cocaine use and addiction. The court erred in excluding his testimony on the basis that he was not a qualified expert.

Finally, the judge excluded the expert testimony because he did not personally believe the content of the proposed testimony. The judge did not believe that the studies and other information cited by Dr. Moore were accurate. A judge cannot exclude expert testimony simply because he does not believe the expert when the expert says that scientific studies have reached a certain conclusion. This sort of analysis goes to the weight and not the admissibility of the evidence. See, State v. Brown, supra.

This case is very similar to Brown. In Brown, the Court of Appeals held the trial court erred in excluding expert testimony regarding the impact of LSD use on the prosecutrix's perceptual ability. As in Brown, the court erred here in excluding evidence of the impact of cocaine addiction and use at the time of the shooting on James' ability to perceive and recall.

d. Evidentiary Errors Require Reversal.

The erroneous exclusion of evidence is harmless if, within reasonable probabilities, the error did not affect the result of the trial. Seattle v. Personeus, 63 Wn. App. at 465. The errors here affected the results of the trial.

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Furthermore, because this issue is not one within the court's ability to take judicial notice, the burden would be on the state to offer evidence that the defense expert was incorrect. There is simply no evidence in the record to support the trial court's conclusion.

If the jury had heard the excluded evidence, it would have learned the following: that Lee stated within 50 minutes of the shooting that he had acted in fear of his life; that Lee went to the police of his own accord, consistent with his belief he had not committed a crime in fending off a threatened deadly attack; that at the time Lee acted he was in a situation where it appeared he had been the victim of a carefully planned and executed robbery which included not only Robinson, but also possibly everyone in the house; that Lee acted within a time frame consistent with that of a person who reasonably believed his life was in danger; that the physical evidence was not consistent with the theory that Lee stood over Robinson as he lay on the ground and fired into his back; how drug and alcohol use would have affected Robinson's behavior and impulse control, thus explaining the reasonableness of Lee's perception of fear; and that James' long-term cocaine use and his use of cocaine just prior to the shooting rendered it extremely unlikely he could have accurately perceived the events in question or later accurately recalled them, thus casting doubt on the primary evidence the state had that Lee did not act in self-defense. Clearly, it cannot be said within reasonable probabilities these errors did not affect the outcome of the trial. Consequently, Lee's conviction should be reversed and the matter remanded for a new trial. Seattle v. Personeus, supra.

- e. Exclusion Of Reliable Defense Evidence Violated The Due Process Right To Present Evidence.

The court's evidentiary rulings violated Lee's state and federal constitutional rights to put on a defense. Due process guarantees a criminal defendant the right to

put on evidence in his or her defense. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1972); 550 P.2d 507 (1976).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies . . . This right is a fundamental element of due process of law.

Washington v. Texas, 338 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967). See also, State v. Hudlow, 99 Wn. at 14-15 (the right to put on a defense is also guaranteed by art. 1, § 22 of the Washington Constitution).

In Chambers, the Court held that where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice. Where evidence crucial to the defense is otherwise relevant and reliable, the hearsay rules cannot be applied to keep it from the jury. 410 U.S. at 302, 93 S. Ct. at 1049. In Washington, the Court held that a state procedural statute prohibiting persons charged as principals, accomplices, or accessories in the same crime from testifying for the defendant could not be applied where it kept the defense from presenting its case. "If Washington v. Texas and Chambers mean anything, it is that 'a judge cannot keep important yet possibly unreliable evidence from the jury.'" Churchwell, The Constitutional Right To Present Evidence: Progeny of Chambers v. Mississippi, 19 Crim.L. Bull. 131, 140 (1983), quoting, Pettijohn v. Hall, 599 F.2d 476, 480 (1st Cir. 1979). "At some point, denying a criminal defendant the right to present relevant evidence amounts to

a denial of due process. This is one rule which was clearly set forth in Chambers." Churchwell, supra at 141.

In this case, the court's evidentiary rulings kept the defense from presenting a great deal of its case. As counsel stated in his motion for mistrial, "I believe that the Court has consistently made evidentiary rulings that have prevented us from presenting the whole picture with respect to Mr. Cook's case. . .".

Even if this Court finds that the lower court did not violate the Rules of Evidence and abuse its discretion in keeping the defense from presenting evidence, under Chambers Lee's conviction must still be reversed.

5. THE TRIAL COURT IMPROPERLY DISMISSED JUROR TRESSNUS.

During trial, Juror Tressnus revealed she was inclined to acquit Lee. After questioning from the court, Tressnus repeatedly assured the judge that she could and would set aside personal views and follow the court's instructions on the law. Despite her response, however, the judge removed Tressnus from the panel based upon his assumption that the remainder of the jurors would vote to convict and she would cause a hung jury. This was reversible error.

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The failure to grant defense counsel's motion for a mistrial is also a basis for reversal in this case. The denial of a motion for a mistrial is an abuse of discretion where no reasonable judge would have reached the same conclusion. The trial court should grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can insure the defendant will be tried fairly. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). Here, no reasonable judge would have erroneously denied admission of almost all of the defense's evidence, nor would a reasonable judge have denied the motion for a mistrial or allowed some other curative action after erroneously denying the admission of so much evidence.

A trial court's decision regarding the impartiality of a seated juror is reviewed as a question of law. State v. Hatley, 41 Wn. App. 789, 795-96 n.3, 706 P.2d 1083 (1985), citing Tate v. Rommel, 3 Wn. App. 933, 478 P.2d 242 (1970).

In Tate, a juror expressed an opinion as to the proper outcome of the case on the first day of trial. The appellate court reversed the trial court's granting of a new trial, finding that the juror's misconduct was not prejudicial because his opinion was not based on evidence received outside of the trial. The court further noted that there had been no showing that the juror had given false answers during voir dire, nor that pre-existing bias was evident in voir dire. The court stated:

Common experience indicates that a juror, or a judge, may form impressions or opinions as to the outcome of a case as he hears each bit of evidence. These impressions or opinions may change from time to time throughout the case. Such opinions or impressions normally are not revealed, and they should not be revealed until the case is ready for decision. Here, juror Cyrus revealed his private opinion after the first day of trial. It is not unreasonable to expect that many of the other jurors, had they been questioned during the trial, would have formed some like opinion as to the outcome as did juror Cyrus.

3 Wn. App. at 937.

In Hatley, the defendant was charged with murder and unlawful possession of a controlled substance. During the second week of a three-week trial, one of the jurors picked up a hitchhiker, who was an acquaintance from high school. The hitchhiker later testified that the juror told him the defendant was "guilty as sin." The trial court found that the juror had made a final decision concerning the defendant's guilt or innocence before the jury had retired to deliberate, demonstrating bias and prejudice to the defendant's right to a fair trial, and ordered a new trial.

The Court of Appeals reversed. Although agreeing that the juror had committed misconduct by expressing an opinion as to guilt or innocence before deliberations had begun, the court noted that the juror had not received information on the case from the hitchhiker. Insofar as he had heard only the evidence presented at trial, the court followed Tate.

Here there was no argument by counsel, nor finding by the judge, that Tressnus had made misrepresentations during voir dire. There was no showing that she discussed her views on the case with other jurors, and she was admonished not to do so. There was also no showing that she had received information about the case outside of the evidence presented in court. Under Tate and Hatley, her inappropriate expression of an early-formed opinion did not justify her removal from the panel.

This is particularly true in light of the answers that Tressnus gave under questioning by the court. The judge asked, ". . . if the Court's instructions on the law are different from the views that you communicated to the judicial assistant, would you follow the Court's instructions on the law?" Tressnus answered, "Yes, I would." The court then rephrased the question, proposing specific language that such an instruction might use. Tressnus again assured the judge that she could set aside her personal views and follow the instructions, but indicated that she felt strongly enough to write letters in an effort to change the law. She stated:

According to this case, yes, I could follow the laws, but I do feel very strongly, but I am not in agreement with a lot of our laws. I understand that they are the laws, and at this point in time they are the laws that have to be

followed, but I, as a civilian, and as a person in this county, would like to see some of those laws changed.

9RP 766.

In so stating, Tressnus showed a sophisticated and mature understanding of our legal system. Laws must be followed until they are changed. She believed that the appropriate response to a law she personally disagreed with would be to work to change the law, not to disregard the court's instructions. The judge had no basis upon which to assume that Tressnus would act in variance with her explicit promises to the court.

The reason the judge elected to disbelieve Tressnus is betrayed by his statement, "I am afraid that -- I am just of the feeling that if I leave her on I am just virtually assuring us of a hung jury." The judge had already decided that the rest of the jury would vote to convict and that Tressnus would hang the jury if she held fast to her early opinion on the case. The judge moved swiftly to remove from the panel a juror who expressed early sympathy for Lee, in total disregard of Lee's right to have that juror participate in deliberations.

Tressnus was properly chosen for the jury after both sides had the opportunity to question her. Her premature expression of opinion should not have been used as an excuse to remove her from the panel to guarantee an assumed verdict. By so doing, and by then refusing the immediate defense motion for mistrial, the court interfered with Lee's right to have his case tried by the jury sworn



to do so and with his right to a fair trial. His conviction should therefore be reversed.

6. FAILURE TO GIVE A REQUESTED "NO DUTY TO RETREAT" INSTRUCTION WAS ERROR.

The defense proposed the following instruction:

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

This is pattern jury instruction WPIC 16.08, and is a correct statement of the law.

See State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984); State v. Hiatt, 187 Wash. 226, 237, 60 P.2d 71 (1936); State v. Lewis, 6 Wn. App. 38, 40-42, 491 P.2d 1062 (1971). Lee was entitled to this instruction under the facts of this case.

The defense is entitled to a "no duty to retreat" instruction when there is evidence in the record to support it. Allery, 101 Wn.2d at 598. However, it is not required that the instruction be given in every case in which there is sufficient evidence to support a self-defense instruction. State v. Frazier, 55 Wn. App. 204, 207, 777 P.2d 27 (1989). In recent cases, the court has analyzed this issue by determining whether the defendant's opportunity to retreat is in issue, having been raised by either side. See State v. Thompson, 47 Wn. App. 1, 5, 733 P.2d 584 (1987); Frazier.

Applying this analysis to the instant case, the issue of opportunity to retreat was raised by the prosecution in arguments to the jury regarding premeditation. The prosecutor's closing included the following:

. . . That pause there in the hallway when James Cook says, "It's not worth it. It's just money." In essence, let's get out of here. No more trouble. Let's just go. And Lee Cook's response, the obscenity and then cocking the gun shows he had decided what to do. He had thought about it, and he was going to go do it. Premeditation. . . .

11RP 1140.

. . . But, if nothing else, that pause there in the foyer in the hallway where his uncle says, "It's not worth it. Let's get out of here," and the Defendant responds with the obscenity and he cocks the gun. **That shows he had the chance not to act against Troy Robinson**, and he decided to do it, and he went in and did it. . . .

11RP 1148.

. . . **He certainly wasn't going to run away from trouble.** He was going to finish it. . . .

11RP 1174.

In essence, the prosecutor argued to the jury that Lee should have run away once he reached the hallway/foyer, and that by standing his ground at that point he evidenced an intent to commit premeditated murder. The trial court's refusal to give a "no duty to retreat" instruction prevented the defense from arguing in response.

The judge was on notice that the prosecutor would make this argument, from his response to the defense motion to dismiss at the close of the state's case-in-chief.

In response to the defense assertion that the state had failed to prove premeditation and intent, the prosecutor stated:

. . . the Defendant preceded him [James Cook] from the apartment to the hallway, and when Mr. James Cook got there -- and at that point, as I recall the testimony, he had -- he, the defendant, -- had a gun in his hand, that James Cook spoke specifically to the Defendant in terms of, "It's not worth it. It's just money; let's get out of here." . . . In other words, he had the chance

right at that point to say that you are right, let's leave, and instead chose the other course. . . .

9RP 834.

It was reasonable to assume that the prosecutor would make the same argument regarding the state's proof of the premeditation and intent elements when he addressed the jury. Knowing that this was the state's argument, the trial judge should have included a "no duty to retreat" instruction.

The need for a "no duty to retreat" instruction was all the more urgent to the defense in light of other instructions given. The court's instruction 22 stated:

Justifiable homicide committed in the defense of the slayer, or "self-defense," is an act of necessity. The right of self-defense does not permit action done in retaliation or revenge.

CP 105 (emphasis added). The following definition of "necessary" was in instruction 23:

Necessary means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the actor at the time.

CP 106 (emphasis added). In light of the prosecutor's argument, these instructions allowed the jury to conclude that fleeing from the hallway was a "reasonably effective alternative" to the use of force, that the shooting could not have been "an act of necessity" and that Lee therefore had a duty to retreat at that point. The absence of a "no duty to retreat" instruction thus prevented a complete consideration by the jury of whether Lee acted in self-defense when he shot Robinson.

"Instructions are sufficient if they correctly state the law, are not misleading, and permit counsel to argue the case satisfactorily to the jury." State v. Ortiz, 52 Wn. App. 523, 530, 762 P.2d 12 (1988). The trial court's refusal to give the "no duty to retreat" instruction prevented the defense from arguing its theory of the case and denied Lee's right to a fair trial.

Prejudice is clear because the jury could have found both that Lee acted in self-defense and that he was guilty of second degree murder under the instructions given. The jury did not believe all of James' testimony, or it would have found premeditation. Thus, it could be that the jurors believed that Lee shot Robinson in self-defense but was also guilty of second degree murder because the shooting was intentional, but not necessary because Lee had the opportunity to retreat.

Based upon the instructional error, Lee's conviction should be reversed.

7. THE TRIAL COURT ERRED IN GIVING AN INSTRUCTION  
BASED UPON STATE V. JANES.

At the request of the state, the court gave the following instruction:

Justifiable Homicide committed in the defense of the slayer, "or self-defense," is an act of necessity. The right of self-defense does not permit action done in retaliation or revenge.

This instruction was unnecessary and improperly emphasized the state's theory of the case. By giving it over defense objection, the trial court committed reversible error.

The language of the instruction came from State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993). In Janes, the trial court refused to give instructions on

justifiable homicide where the defendant asserted the defense of battered child syndrome. The Court first ruled that evidence of battered child syndrome is admissible proof for a theory of self-defense. The Court then held that the trial court's consideration regarding a self-defense instruction was incomplete, and remanded for the trial court to "reconsider its ruling denying the self-defense instruction in light of the principles discussed in this opinion." 121 Wn.2d at 242.

Janes provides a comprehensive review of the law of self-defense in Washington. The opinion indicates, however, that the principles discussed are "the longstanding rule in this jurisdiction." 121 Wn.2d at 238. The language in the opinion adopted by the state for its instruction in this case is a quote from an Illinois case, which Janes cites merely to emphasize a point already well established in Washington. This language does not create a new precept of self-defense for which a new and specific instruction is merited.

On the contrary, the general self-defense instructions given by the court fully covered the point of law on which the state obtained its instruction. "A specific instruction should not be given when a general instruction adequately explains the law, and the parties are able to argue their theories of the case within the general instruction." State v. Stone, 24 Wn. App. 270, 600 P.2d 677 (1979), citing State v. Bradley, 20 Wn. App. 340, 344, 581 P.2d 1053 (1978). See also, Szupkay v. Cozzetti, 37 Wn. App. 30, 678 P.2d 358 (1984); State v. Rice, 110 Wn.2d 577, 757 P.2d 889 (1988). The general self-defense instructions fully enabled the state to argue its theory of the case. By adding the specific Janes instruction, the court

unduly emphasized the prosecution theory and gave the jury the impression that the court disbelieved or was particularly concerned with this aspect of the self-defense claim.

The court's submission of the Janes instruction also constituted an improper comment on the evidence. Wash. Const. art. 4, § 16 forbids a judge to comment on matters of fact.

The court's emphasis on the prosecution's theory was particularly harmful in combination with the court's failure to give all of the self-defense instructions supporting the defense theory of the case. As set out above, the Janes instruction, and its companion instruction defining "necessary," were given in the absence of a balancing "no duty to retreat" instruction. Thus, the jury was not fully informed of the law supporting Lee's assertion of self-defense, while it received special emphasis from the court about the state's theory of retribution.

Instructional imbalance could have been avoided if the trial court had declined to give the specific Janes instruction and had required the state to dispute the defense theory from the general instruction on self-defense. As it was, the opportunity for a fair trial was denied, and Lee's conviction should be reversed.

D. CONCLUSION

For all the reasons set forth above, Lee's conviction must now be reversed.

DATED this \_\_\_\_ day of January, 1996.

Respectfully submitted,

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